IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re PATRIOT AMERICAN HOSPITALITY INC SECURITIES LITIGATION

MDL No C-00-1300 VRW

ORDER

This Document Relates To:

THE MERGER ACTION

99-2153 VRW 99-2239 VRW
99-3040 VRW 99-3966 VRW
00-0947 VRW

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As described in this court's preliminary approval order of July 14, 2005, Doc #206 (the "7/14/05 order"), the lead plaintiff in this securities class action, Doris Johnson, has reached a settlement with the defendants. In that order, the court preliminarily approved the proposed settlement, certified a settlement class pursuant to FRCP 23, preliminarily approved the proposed plan of allocation, approved (subject to certain modifications) a form of notice to be sent to class members and preliminarily approved the lead plaintiff's application for an

award of attorneys' fees and expenses. Notice having been disseminated to the class under the terms of the court's order, see Doc #214 (Hansman Decl), plaintiff now moves for final approval of the proposed settlement, final approval of the plan of allocation, an award of attorneys' fees and expenses and authorization to make future payments to the claims administrator from the settlement fund. Doc #212.

The court held a final settlement approval hearing (the "hearing") on October 18, 2005. For the reasons that follow, the court GRANTS final approval of the proposed settlement, GRANTS final approval of the plan of allocation and GRANTS an award of attorneys' fees and expenses to lead counsel. Because the 7/14/05 order addressed many of the issues presented here for final approval, the court assumes familiarity with the 7/14/05 order; the court will confine its discussion in this order to recent developments and further analysis.

I

The court first takes up the issue of the fairness of the settlement, which, in the aggregate, consists of $12,650,000 in cash. In assessing whether a settlement is "fair, reasonable and adequate" under FRCP 23(e)(1)(C), this court is to consider several factors:

> (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement [presumably in relation to maximum potential recovery or in comparison to comparable cases]; (5) the extent of discovery

> completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members to the proposed settlement.

Churchill Village v General Electric, 361 F3d 566, 575 (9th Cir 2004) (citing Hanlon v Chrysler Corp, 150 F3d 1011, 1026 (9th Cir 1998)). To these factors, the court adds (9) the procedure by which the settlements were arrived at, see Manual for Complex Litigation (Second) § 30.44 (1985), and (10) the role taken by the lead plaintiff in that process, a factor somewhat unique to the PSLRA.

Factor (1) favors the settlement. The sole remaining claims arise under sections 11 and 12(a)(2) of the Securities Act of 1933, and are premised upon two theories: (1) defendant Patriot American Hospitality, Inc's ("PAH") failure to disclose in the merger proxy statement that PAH intended to take on substantial debt and (2) PAH's failure to disclose its intent to rely upon high-risk forward equity contracts to fund aggressive expansion plans. In order to recover on either theory, the finder of fact would need to find that PAH specifically intended either to take on substantial debt or to rely upon forward equity contracts. And even if the finder of fact were to find liability, loss causation and damages have been continuously and vigorously disputed by defendants.

Factor (2) also militates in favor of the settlement. Class counsel in the "open market action" (a parallel class action) highlight a risk of non-recovery or diminished recovery if the litigation were to continue due to the precarious financial position of both PAH and its primary directors and officers

insurance carrier. Doc #216 at 13-14; see also Torrisi v Tucson Elec Power Co, 8 F3d 1370, 1376 (9th Cir 1993) (characterizing defendant's financial position as a "predomina[nt]" factor favoring settlement approval). The court is reluctant to accord too much weight to these unsubstantiated statements. Still, the court finds that the expense and uncertainty of litigating issues related to intent, causation and damages support a settlement that would confer an immediate, certain and, as discussed below, relatively substantial recovery upon the class.

Factor (3) generally does not weigh heavily in favor of settlement in securities fraud class actions, because class treatment is generally appropriate in such litigation.

The amount of the settlement is substantial in comparison to various measures of the maximum potential recovery, thereby aligning factor (4) in favor of settlement. According to plaintiff's expert Dr Marc Vellrath, the maximum damages available to the class in the merger action is $28.7 million. The settlement of $12.65 million represents 44% of Dr Vellrath's estimated total damages. This percentage is well above the mean and median observed in the Bajaj Report relied upon by this court in In re Cylink Securities Litigation, 274 F Supp 2d 1109, 1114 (ND Cal 2003) (Walker, J).

The settlement can also be evaluated against the total "market drop." Id at 1113. The value of PAH shares never exceeded $44/share during the class period, and sold for approximately $10/share at the end of the class period, with a difference of $34/share. Multiplying this figure by 5.75 million (the approximate number of shares held by class members during the class

period) yields a total market drop of $195.5 million. The proposed settlement represents 6.47% of the total market drop, which is significantly higher than the mean and median identified in the Bajaj Report relied upon by the court in Cylink. See id at 1114 (identifying a market drop recovery mean of 2.95% and a median of 2.02%).

Factor (5) strongly favors settlement. This litigation is now in its sixth year and had proceeded for four years before settlement negotiations commenced. Class counsel has reviewed over 200,000 documents produced in the course of discovery. Moreover, this discovery was conducted before, and therefore presumably informed, the settlement negotiations.

The views of counsel, factor (6), support settlement. While some courts have indicated that such views are entitled to deference, see, e g, Williams v Vukovich, 720 F2d 909, 922-23 (6th Cir 1983), the court is reluctant to put much stock in lead counsel's pronouncements, given their obvious pecuniary interest in seeing the settlement approved.

Factor (7) does not support the settlement, inasmuch as there is no government participant present.

Factor (8) strongly supports the settlement. The response to the notice mailed to individual class members and published in The San Francisco Chronicle and Investor's Business Daily has been positive. The claims administrator has received hundreds of proof of claim forms. More importantly, no objector has come forward. And although two class members have requested exclusion from the settlement (i e, opted out), see Doc #219 (Marotto Decl), Ex A, in the main class members have elected to

remain in the class.

As discussed in the 7/14/05 order, the settlement was reached after protracted arm's-length negotiations by experienced counsel. 7/14/05 order at 5. Factor (9) therefore supports the settlement.

Finally, factor (10) supports the settlement because lead plaintiff participated in the settlement negotiations, see Doc #185 (Molumphy Decl) at 4, ¶11, something Congress sought to foster by the PSLRA's lead plaintiff provisions.

For the reasons discussed above and in its 7/14/05 order, the court finds that, on balance, the settlement is fair, reasonable and adequate to the class within the meaning of FRCP 23(e)(1)(C). Accordingly, the court GRANTS plaintiff's motion for final settlement approval.

II

As suggested by the court's extended discussion of the plan of allocation in its 7/14/05 order, the court has harbored doubts about the plan of allocation inasmuch as it extinguishes the claims of a large number of class members in exchange for zero recovery. Specifically, class members who sold their PAH shares on or before November 8, 1998, (the "in-and-out" class members) will recover nothing under the proposed plan of allocation.

Recognizing that the best course was to allow in-and-out class members to decide for themselves, the court preliminarily approved the plan of allocation, subject to modifications in the form of notice that would explicitly and with emphasis warn in-and-out class members that they were giving up their right to recover

in exchange for no consideration. Specifically, the court ordered:

> The following language shall be inserted before the last paragraph of part VII: "The exact recovery received by each Settlement Class Member is determined by the Plan of Allocation, which is described in Part IX. Under the Plan of Allocation, some Settlement Class Members will receive nothing, but will nonetheless give up their right to pursue the Released Claims against the Released Persons. In particular, Settlement Class Members who exchanged their shares on a one-for-one basis for shares in Patriot but sold the Patriot shares on or before November 9, 1998, will receive nothing under the plan of allocation. *If you are a Settlement Class Member who falls within the group described above, you may wish to exercise your rights described in part VIII of this notice, or to use the procedures described in part IX of this notice*."

7/14/05 order at 10:13-11:3. The court concludes that, with the inclusion of this language, the notice directed to class members adequately advised them of the proposed plan of allocation and their rights with respect thereto.

No class member came forward to object to this plan of allocation. It does not appear that either of the two class members who elected to opt out were in-and-out class members. See Marotto Decl, Ex A. The court is therefore constrained to find that the class does not object to the proposed plan of allocation.

After further review of the report of plaintiff's expert, Dr Vellrath, the court is satisfied that the plan of allocation distributes funds consistent with the various levels of price inflation that existed during the class period. Dr Vellrath based the plan of allocation on an event study prepared by Dr Scott Hakala. See Doc #178 (Hakala Decl). Based on Dr Hakala's findings, Dr Vellrath concluded that PAH shares were inflated by 11.1% at the time of the merger, which, after accounting for stock

splits, equals approximately $2.477 per share (rounded up to $2.48 per share). Doc #205 (Vellrath Decl) at 4 n2. On November 9, 1998, PAH disclosed proceeds from the sale of PAH properties in an amount insufficient to fund PAH's forward equity contract obligations. Hakala Decl at 11. In Dr Vellrath's estimation, this disclosure reduced the amount of price inflation attributable to defendants' alleged misrepresentations to 4.7%. Vellrath Decl at 7. On December 16, 1998, PAH announced a recapitalization plan to settle PAH's forward equity contract obligations. This disclosure produced an initial upturn in the price of PAH stock, followed by a downturn on December 17, 1998. Dr Vellrath agreed with Dr Hakala's assumption that all fraud-induced inflation was eliminated from the price of PAH shares as of December 17, 1998 (the end of the class period). Id.

The court is satisfied that the event study prepared by Dr Hakala is sufficiently sound for purposes of supporting Dr Vellrath's plan of allocation. Viewing these findings against a backdrop devoid of objections and opt-outs by in-and-out class members, the court finds it appropriate to GRANT plaintiff's motion for final approval of the plan of allocation. Settlement proceeds shall be distributed among class members as follows:

(1) For shares sold on or after December 17, 1998, and for "retention" shares held on May 7, 1999: $2.48 per share;

(2) For shares sold on or before November 9, 1998: No damages;

(3) For shares sold on or after November 9, 1998, and on or before December 15, 1998: $2.48 per share less 4.7% of the selling price; and

(4) For shares sold on December 16, 1998: $2.48 per share less 10.9% of the selling price.

III

Plaintiff seeks an award of attorneys' fees in the amount of $2,500,000 to be paid from the settlement fund. Plaintiff also seeks reimbursement in the amount of $81,805.58 for expenses incurred to date. Plaintiff further requests authorization to make future payments from the settlement fund to the claims administrator for additional expenses not yet incurred. At the hearing, plaintiff's counsel suggested that these future costs should not exceed $45,000. Adding these figures to the requested fee award produces a sum total award of $2,626,805.58, which represents 20.6% of the common fund. A percentage of 20.6% is at the low end of the range and below the mean for the percentage of common funds devoted to attorneys' fees and costs. See 7/14/05 order at 11 (reciting data from Stuart J Loan, Jack Moshman & Beverly C Moore, Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep 167 (2003)). As noted elsewhere, the court has serious reservations about the adequacy of such a comparison to test the reasonableness of a fee award. See generally Vaughn R Walker & Ben Horwich, The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Class Actions, 18 Georgetown J Legal Ethics 1453 (2005).

Yet, and as discussed in the 7/15/04 order, plaintiff's counsel performed a lodestar cross-check consistent with the analysis set forth in In re HPL Technologies, Inc Securities Litig,

366 F Supp 2d 912 (ND Cal 2005) (Walker, J). The lodestar cross-check produced a lodestar amount of $951,523,75, resulting in an implied multiplier of approximately 2.63. 7/14/05 order at 12 (citing Doc #196 at 10). While an implied multiplier of this magnitude appears to be on the high side of reasonableness, class members' apparent satisfaction with the terms of the settlement and the plan of allocation, as well as counsel's performance, militates in favor of the award. This is sufficient to satisfy the court in this case that there is no great public disservice in making an award of this scale relative to the amount of attorney effort.

Accordingly, the court GRANTS plaintiff's motion for attorneys' fees and expenses in the amount of $2,626,805.58.

IV

In sum, plaintiff's motion for final settlement approval, final approval of the plan of allocation and an award of attorneys' fees and expenses is GRANTED.

IT IS SO ORDERED.

VAUGHN R WALKER

United States District Chief Judge